NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 29 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. KEITH SHWAYDER, Defendant - Appellant.	No. 05-15349 D.C. Nos. CV-04-00136-PMP CR-96-00288-PMP MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Submitted December 5, 2005**
San Francisco, California

Before: TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

Keith Shwayder appeals the district court's denial of his 28 U.S.C. § 2255 motion on six grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm. The district court properly denied the motion.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Assuming Shwayder's claim for ineffective assistance of trial counsel based on his counsel's failure to disclose the full extent of his conflict of interest differs from the claim Shwayder raised on direct appeal, it fails. The definition of an "actual conflict" requiring reversal under *Mickens v. Taylor*[1] is a conflict that actually "affected counsel's performance."[2] This court found on direct appeal that the conflict did not affect counsel's performance. That finding precludes the conclusion that counsel's conflict in this case requires reversal under *Mickens*.[3]

Shwayder's second claim, for ineffective assistance of appellate counsel, also fails.[4] The district court found that counsel's decision not to raise the sentencing issues in question was "a matter of professional judgment and strategy."

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[1] 535 U.S. 162, 171 (2002).

[2] *Id.*; *see United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) ("'[A]ctual conflict' is a term of art defined by reference not to the nature of the alleged conflict itself, but to the effect of the conflict on the attorney's ability to advocate effectively.").

[3] To the extent that Shwayder also raises a claim of ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), this court's previous finding prevents him from showing prejudice. *Id.* at 687.

[4] To the extent Shwayder intended to raise in this appeal a claim of ineffective assistance of counsel at sentencing, he waived that issue by failing to raise it before the district court. *See Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996).

Shwayder does not challenge this finding, much less show that it is clearly erroneous.[5] Accordingly, we affirm.[6]

Shwayder procedurally defaulted his third and fourth claims, that the Government failed to turn over *Brady*[7] material and that it issued a multiplicitous indictment. Shwayder argues that his appellate counsel was ineffective for failing to raise these issues on direct appeal, and that this ineffectiveness constitutes cause for his default. This argument fails.[8]

Shwayder's fifth claim, under *Blakely v. Washington*,[9] fails because *Blakely* does not apply retroactively.[10] Shwayder's sixth claim, that the district court abused its discretion[11] when it denied his request for an evidentiary hearing, also

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[5] *United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004) (reciting standard of review).

[6] *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that appellate counsel need not raise every non-frivolous issue on appeal).

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

[8] *Murray v. Carrier*, 477 U.S. 478, 486 (1986) ("[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.").

[9] 542 U.S. 296 (2004).

[10] *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005).

[11] *Rodrigues*, 347 F.3d at 823 (reciting standard of review).

fails. The district court properly determined that no evidentiary hearing was warranted.[12]

AFFIRMED.

[12] *See* 28 U.S.C. § 2255 (providing for a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); *Rodrigues*, 347 F.3d at 824 (noting that, to be entitled to a hearing, a petitioner must "allege specific facts which, if true, would entitle him to relief") (internal quotation marks omitted).